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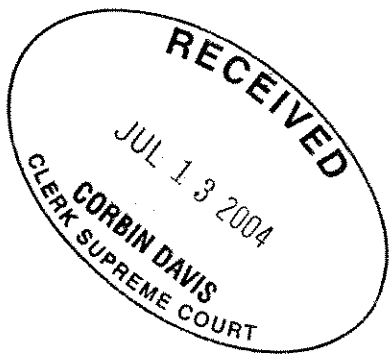


Corbin R. Davis, Clerk
Michigan Supreme Court
Michigan Hall of Justice
925 W. Ottawa
P.O. Box 30048
Lansing, MI 48909

Re: ADM File No. 2002-34
Proposed Administrative Order Concerning
Delay Reduction in the Court of Appeals

Dear Mr. Davis:

As an appellate specialist and interested observer of the rule-making process (an outside observer in this case, since I was not a member of the Case Management Work Group that developed this proposal), I write to suggest three small changes in the above-referenced Administrative Order. I recommend that the Court consider adopting these changes before the two-year experiment begins, because I believe the changes will be beneficial to litigants, the Court of Appeals, and the experiment itself.

When leave has been granted, let the parties choose to rely on application papers

Parties who find themselves on the super-fast summary disposition track after leave has been granted should have a choice. I think they should have the choice of sticking with their application briefs, both the application and the response, rather than having to revert to the trial court briefs as supplemented by 20-page appeal briefs. The only section of these briefs that will become superfluous after leave is granted is the section that talks about why interlocutory review is necessary (or unnecessary). This is generally a short section at the Court of Appeals level.

The rest of the application argument and response will discuss the merits, in most cases better than the trial brief. This is not a criticism of trial lawyers. A second draft of a brief is always better than the first draft, and the application will have been written after the first brief, with the benefit of having seen the trial court response to the motion and possibly an opinion from the trial court. Moreover, the application has the luxury of a more liberal page limit,

permitting the issues to be developed more fully, and with more attention to "big picture" jurisprudential concerns that appellate judges tend to consider.

The super-fast track would not be slowed down at all if this choice were provided to litigants, because the application and response briefs, like the trial court briefs, will have been finished and filed before day one on the fast track. It would be easy to modify the proposal in ADM No. 2002-34 to give parties this option. Rule 9, "Briefs on Appeal," could add a subsection called "Briefs When Leave Has Been Granted." It could say something like this:

> If leave to appeal has been granted, any party may elect to submit the application or the response to the application in lieu of that party's trial brief, along with any appendix filed with the application or response. In such cases, a supplemental brief of no more than 10 pages may be filed by that party at the same time.

The parties who make this choice will need at least a few pages to update their application papers. In particular, the appellant should be allowed to supplement the application in light of the appellee's response. I see no reason why parties should not be given this choice. It will be better for everyone, including the court.

Permit 5-page reply briefs to be filed within 14 days

Appellate specialists are concerned about the double whammy of getting no reply brief and no oral argument. This is especially burdensome to appellants, who are placed in the unusual position of ceding the last word to the appellee, unless the court permits a reply brief on motion granted. (It seems unlikely that leave to reply will often be granted, since most of the six-month target period will have elapsed by the time the brief of appellee is filed.) Some appellees surely are going to be tempted to take advantage of their last word to say things they might not say if their opponent could reply.

I don't expect that the Court will be inclined to add back oral argument to the Administrative Order. Oral argument would inevitably slow down the fast track. Reply briefs, on the other hand, if made due in 14 days and limited to five pages, would not slow down the process much at all. As an "optional" brief, the court wouldn't have to wait to see if a reply was going to be filed. Nor would the few extra pages burden the court. And the benefits are clear. For example, in the absence of a reply brief, I foresee that some outraged appellants may be filing motions to strike appellee briefs, when if they had the option, they would just vent in a reply.

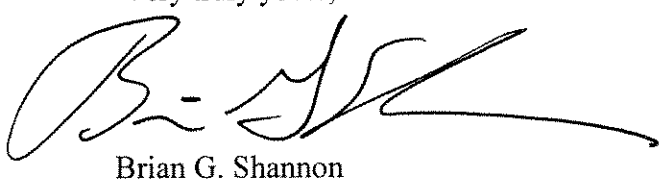
Give judges the option of removing appeals from the fast track

Finally, I'd like to suggest another cost-free safety valve that might remove a few more cases from the super fast-track that simply should not be decided in that fashion.

I think the summary disposition panel *itself* should have an explicit post-briefing option to remove the case from the fast track. Just because the appellant failed to seek removal when the appeal was claimed, and just because the appellee failed to seek removal before filing its brief, a court of appeals panel should not be compelled to decide a complicated issue of first impression on inadequate briefs with no oral argument. If the panel is uncomfortable with summary review, it should have the option of kicking the appeal back to the regular track.

It would be naïve to think that parties always are going to request removal of all cases that have no business being on the summary disposition docket. Some parties may do this deliberately; some parties may do this inadvertently. But judges are crucial participants in the process, too, and the proposed AO as written gives them no ability to decide, after briefing, that the parties erred in not seeking removal.

Very truly yours,



Brian G. Shannon

cc: Chief Judge William C. Whitbeck, Chairperson, Case Management Work Group
Victor S. Valenti, Chair, Appellate Practice Section
J. Mark Cooney, Chair-Elect, Appellate Practice Section